

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ANN MARIE ROSE BAKER, M.D.,
PLAINTIFF,

v. CIVIL ACTION NO. 4:08-CV-1908

UNIVERSITY OF TEXAS HEALTH SCIENCE
CENTER - HOUSTON, AND THE UNIVERSITY OF
TEXAS SYSTEM MEDICAL FOUNDATION,
DEFENDANTS.

PLAINTIFF, ANN MARIE ROSE BAKER, M.D.'S,
MOTION FOR LEAVE TO FILE
PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff, Ann Marie Rose Baker, M.D., files this Motion for Leave to file her First Amended Complaint, and would show unto the Court as follows:

1. Defendants have filed a Motion for Dismissal based on Rule 12(b), Federal Rules of Civil Procedure, and directed against Plaintiff's Original Complaint. With respect to Plaintiff's complaint of discrimination, Defendants seek to identify which section of the Americans with Disabilities Act Plaintiff's claim arose under - even though the Original Complaint was silent as to same. The First Amended Complaint seeks to clarify and identify the areas of the ADA relied upon for the claim of discrimination based upon Plaintiff's disability.

Jurisdiction and Venue

2. Under jurisdiction and venue, Plaintiff's First Amended Complaint makes clear that jurisdiction lies under the Americans with Disabilities Act, Title II, and under the Rehabilitation Act of 1973. The Original Complaint identified the Americans with Disabilities Act, but did not identify a section. The First Amended Complaint also adds the Rehabilitation Act of 1973 in that the filing is timely and within the limitations period.

3. In Plaintiff's Original Complaint (doc. 1), paragraphs 8-16, sufficient facts are asserted with respect to the relationship between the Defendants. The modification of this section is minor (Plaintiff's First Amended Complaint, paragraphs 10-17).

4. Plaintiff's Original Complaint was deficient in context of discrimination and the accommodation facts under Title II (paragraphs 17-20) and Plaintiff's First Amended Complaint addresses this deficiency (paragraphs 19-44). The additional paragraphs set out the complaint in greater detail, provide dates that are important in establishing a time line, and formats the pleadings in a manner more consistent with the federal rules.

5. This Motion for leave is filed in support of Plaintiff's Response to Defendants' Motion to Dismiss. In addition, the Motion for Leave and First Amended Complaint are consistent with the underlying tenets of 12(b) responses under the Federal Rules of Civil Procedure.

Consultation with Opposing Counsel

6. Consultation with opposing counsel was not accomplished in light of the late night and weekend preparation of the document. Counsel will confer and supplement this filing with the position of opposing counsel.¹

DATE: March 21, 2009.

Respectfully submitted,

/S/ ANTHONY P. GRIFFIN

ANTHONY P. GRIFFIN
ATTORNEY-IN-CHARGE

¹ "Rule 15 of the Federal Rules of Civil Procedure states that a court "should freely give [leave to amend] when justice so requires." "Although Rule 15 evinces a bias in favor of granting leave to amend, it is not automatic." *Southmark Corp. v. Schulte Roth & Zabel (In re Southmark Corp.)*, 88 F.3d 311, 314 (5th Cir. 1996) (quotation marks and citation omitted). Under Rule 15, the courts consider such equitable factors as "(1) undue delay; (2) bad faith; (3) dilatory motive on the part of the movant; (4) repeated failure to cure deficiencies by any previously allowed amendment; (5) undue prejudice to the opposing party; and (6) futility of amendment." *Ellis v. Liberty Life Assur. Co.*, 394 F.3d 262, 268 (5th Cir. 2004); *The Torch Liquidating Trust v. Stockstill*, ____F.3d____, LEXIS 5339 *36 (5th Cir. February 23, 2009).

A GRIFFIN LAWYERS
1115 MOODY
GALVESTON, TEXAS 77550
409.763.0386
1.800.750.5034
FACSIMILE NO. 409.763.4102

TEXAS STATE BAR NO. 08455300
FEDERAL I.D. NO. 4736

ATTORNEYS FOR PLAINTIFF
ANN MARIE ROSE BAKER, M.D.

CERTIFICATE OF SERVICE

This is to certify that Plaintiff's Motion for Leave to File Plaintiff's First Amended Complaint was forwarded to all counsels of record by electronically filing same on this the 21st day of March, 2009 and/or by forwarding the document by certified mail, return receipt requested wherein noted, to-wit:

SAM LIVELY
ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
GENERAL LITIGATION DIVISION
P. O. BOX 12548, CAPITOL STATION
AUSTIN, TEXAS 78711

/S/ ANTHONY P. GRIFFIN

ANTHONY P. GRIFFIN

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